IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1171

STATE OF MINNESOTA,

Petitioner,

vs.

CLOVER LEAF CREAMERY COMPANY, PHILLIPS PETROLEUM COMPANY, MARIGOLD FOODS, INC., UNILOY DIVISION OF HOOVER UNIVERSAL, INC., WEBER & BARLOW STORES, INC., THE SOCIETY OF THE PLASTICS INDUSTRY, INC., WELLS DAIRY, INC., and M-H PACKAGING SYSTEMS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR PETITIONER

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OPINIONS BELOW

The Opinion of the Minnesota Supreme Court and dissent (A-31)[1] are reported at 289 N.W.2d 79 (Minn. 1979). The order and memorandum of the State District Court (A-16) are unpublished.

JURISDICTION

The Opinion of the Minnesota Supreme Court (A-31) was filed on September 7, 1979. A timely petition for rehearing was denied and judgment entered on October 31, 1979. (A-53, 54) In this case, the Minnesota Supreme Court, the highest state court in Minnesota, held that Minn. Laws 1977, ch. 268, is repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. A petition for a writ of certiorari was filed on January 29, 1980, and was granted on March 31, 1980. The jurisdiction of this Court rests upon 28 U.S.C.A. § 1257(3) (1968).

QUESTION PRESENTED

Is a state statute banning the use of nonreturnable plastic containers for milk sales, because of their adverse environmental and resource impact, invalid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it does not also prohibit or compel the elimination of another type of milk packaging which may also have an adverse environmental impact?

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[1] References to the joint Appendix are cited as "A- ".

STATEMENT OF THE CASE

I. The Statute In Question

The 1977 Session of the Minnesota Legislature duly enacted Minn. Laws 1977, ch. 268, codified as Minn. Stat. §§ 116F.21, 116F.22 (sometimes referred to hereinafter as "the Act"). That act provides:

> Section 1. [116F.21] MILK: PLASTIC CONTAINERS: STATEMENT OF POLICY. The legislature finds that the use of nonreturnable, nonrefillable containers for the packaging of milk and other milk products presents a solid waste management problem for the state, promotes energy waste and depletes natural resources. The legislature therefore, in furtherance of the policies stated in [Minnesota Statutes] section 116F.01, determines that the use of nonreturnable, nonrefillable containers for packaging milk and other milk products should be discouraged and that the use of returnable and reusable packaging for these products is preferred and should be encouraged.
>
> Section 2. [116F.22] PROHIBITIONS. Subdivision 1. No person shall sell at retail or offer for sale at retail in this state any milk or fluid milk product as defined in [Minnesota Statutes] section 32.391, other than sour cream, cottage cheese and yogurt, in a nonreturnable, nonrefillable rigid or semi-rigid container at least 50 percent of which is plastic.
>
> Subd. 2. A violation of subdivision 1 is a misdemeanor and each day of violation is a separate offense.

Section 3. This act is effective July 1, 1977.[2]

II. Procedural History

In this action, commenced on September 29, 1977, the various plaintiffs-respondents (hereinafter "the plaintiffs") challenge the constitutionality of Minn. Laws 1977, ch. 268, codified as Minn. Stat. §§ 116F.21, 116F.22 (1978), which prohibits the sale of milk in certain single-use plastic containers. The plaintiffs fall generally into two categories: those involved in the packaging and sale of milk, and those involved in the production and sale of plastic goods and associated equipment. The first group includes: Clover Leaf Creamery Company ("Clover Leaf"), a Minnesota dairy; Marigold Foods, Inc. ("Marigold"), a Minnesota dairy; Wells Dairy, Inc. ("Wells"), an Iowa dairy; and Weber & Barlow Stores, Inc. ("Barlow"), a grocery retailer. The second group includes: the Society of the Plastics Industry, Inc. ("SPI"), the principal trade association of the plastics industry; Phillips Petroleum Company ("Phillips"), a multi-national petrochemical company; Hoover Universal, Inc. ("Hoover"), a maker of molding equipment; and M-H Packaging Systems, Inc. ("M-H"), a molder of plastic containers.

On November 29, 1977, the State of Minnesota (hereinafter the State) moved for an order dismissing the plaintiffs' complaint. (A-10) Seven dairy companies[3] filed a brief in

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[2] Minn. Laws 1977, ch. 455, § 96, provided:

Sec. 96. Notwithstanding any law to the contrary, no prohibition on the retail sale or the offer for retail sale of milk in nonreturnable, nonrefillable plastic containers shall be effective prior to July 1, 1978. This section is effective the day following final enactment.

Thus, the Act was to have taken effect July 1, 1978.

[3] Ewald Dairy, Meyers Bros. Dairy, Oak Grove Dairy, Polka Dot Dairy, Purity Dairy, Sanitary Dairy, and Schroeder Dairy Co., Inc. *See* Brief of Amicus Curiae in support of Motion to Dismiss.

support of the State's motion. On December 20, 1977, the State's motion was denied. (A-11) Trial was held in Ramsey County District Court commencing on March 15, 1978, and concluding March 21, 1978. On April 5, 1978, the District Court issued its order holding that the Act is unconstitutional and unenforceable upon various grounds asserted by plaintiffs. (A-16) Judgment was entered in accordance with that order on April 7, 1978. (A-28)

The State appealed to the Minnesota Supreme Court, which, on September 7, 1979, affirmed the District Court ruling, holding that the Act denies equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. (A-31) The State's petition for rehearing was denied on October 31, 1979, (A-52) and judgment was entered. (A-53) The State petitioned this Court for certiorari, which was granted on March 31, 1980.

III. Background: The State Of The Market

In general, milk containers can be broken into three categories: (1) returnable containers, made of glass or plastic; (2) non-returnable, or throwaway, containers, made of plastic or paperboard; and (3) the plastic "pouch" container, a flexible plastic bag which is typically inserted in a rigid reusable pitcher. The returnable containers, because they can be used as many as 50, 100, or even 150 times, have relatively small environmental and resource impacts per gallon of milk delivered. Similarly, the pouch, while it is not reusable, has a relatively limited effect on resource depletion, waste disposal and other environmental concerns. The two types of containers with by far the most adverse impact are the throwaway plastic and the throwaway paper containers.

For most of this century, the returnable glass bottle was the predominant container for the sale of milk, both in Minnesota and nationally. (T. 355)[4] Since the early 1960's, the paper carton has predominated, and has held approximately 60 to 70 percent of the market. (T. 76) In the 1960's, the non-returnable plastic container (hereinafter sometimes referred to as the "plastic container" or "plastic jug") began to appear in the gallon size. In 1966, plastic containers still accounted for less than one percent of milk containers nationally. (T. 618) Since that time, however, sales of plastic containers have grown at a remarkable rate, primarily at the expense of glass returnable bottles. (T. 76, 77) By the time of trial in 1978, plastic held approximately 30 percent of the national market and, at the national level, glass bottles had been virtually eliminated. (T. 77) If unchecked, the throwaway plastic container was projected to occupy more than half the national market within ten years. (T. 77)

The phenomenal growth of the throwaway plastic container is the result of its consumer convenience features, which make it virtually unstoppable once it gains a foothold in a market. Plaintiffs' witnesses testified that they had "never seen anything take over like this . . .," (T. 413) and that the throwaway plastic jugs have "preempted the market." (T. 426) The gallon paper carton simply can't compete with the plastic jug. (T. 346) Because the gallon paper carton leaks, is awkward to handle and seal, and is susceptible to odors and spoilage, it was described as "probably the most cumbersome and least well thought of package in the entire industry." (T. 450) One witness for plaintiffs testified that when another dairy introduced the plastic container into a Nebraska market where he was selling paper cartons, "[w]e quickly found that either

[4] "T. " refers to the transcript of the trial in the Minnesota District Court.

we were going to have a plastic package to compete with it or we were not going to be in business." (T. 423)

The situation in Minnesota in 1976 and 1977 was different, however. Minnesota was one of the last areas in the country where the one-way plastic container was introduced. (T. 295, 459) Prior to 1977, the plastic container was still a relative newcomer. While, by that time, a number of dairies outside the Minneapolis-St. Paul metropolitan area were marketing the throwaway plastic container (T. 354, 421, 449), only one Minnesota dairy, plaintiff Marigold, was actually producing this container. (T. 459) A number of dairies continued to market the traditional, environmentally preferable, returnable container, some in glass, others in plastic.[5]

In 1976, a major structural change in the Minnesota market appeared to be imminent. In that year, many Minnesota dairies began taking steps toward the in-house production of plastic containers for the sale of milk. (T. 628) By late 1976, at least 6 dairies had placed orders for heavy blow-molding machinery to be used in the production of such containers, at an average cost of $220,000 per machine. (T. 254, 259-263; Defendant's Exhibit 1) These machines, all of which are made by plaintiff Hoover Universal, Inc. (T. 244), have a useful life of at least 13 years. (T. 259)[6]

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[5] Plaintiffs' witness Dwight Holcombe testified that Hastings Cooperative, Schroeder Milk Company and Oak Grove Dairy sell milk in returnable plastic bottles. (T. 355, 353) Plaintiffs' witness David Ramsey testified that Danheim Dairy uses returnable glass bottles. (T. 466, 467) The State's expert witness, Harold Samtur, testified that Schroeder Dairy uses returnable containers. (T. 562, 563) Further, Samtur was not permitted to identify other dairies using returnables, on the ground that his testimony, based on conversations with representatives of various dairies and the Minnesota Department of Agriculture, was hearsay. The State made an offer of proof that, if permitted to testify, Samtur would state that returnables were also used by Land O' Lakes Dairy in Duluth, by Polka Dot Dairy and by Superior Dairies. (T. 559-563)

[6] Plaintiffs' witness Samuel Rupert, of Hoover Universal, Inc., testified that every machine sold in 1964 was still in operation at the time of trial in 1978, so that he was not sure what the predicted life of the machines is. (T. 259)

Before these purchases were consummated, however, it became apparent that the Minnesota legislature was contemplating a prohibition of the throwaway plastic container, and all but one of the dairies were able to cancel their orders. (T. 259) The single dairy to take delivery of blow-molding machinery was able to reach a buy-back agreement, under which the manufacturer agreed to repurchase the machinery, charging the dairy only a less-than-normal fee for use of the equipment. (Plaintiffs' Exhibit R, T. 250, 251, 263, 264) In addition, plaintiff M-H Packaging purchased a blow-molding machine in the fall of 1976 for the manufacture of plastic containers for milk, juice and water. (T. 283-285, 293, 294)

IV. Background: Enactment Of The Statute

In early 1977, with major dairies on the verge of great financial commitment to the throwaway plastic container, the Minnesota legislature acted to ban its use. The introductory remarks of Senator William Luther, the bill's chief sponsor in the Minnesota Senate, (T. 121), upon the opening of the Senate floor debates, are set out here in full to convey the breadth of the concerns underlying the legislature's action.[7] Senator Luther stated:

> Mr. President, members of the Senate, H.F. 45 is the bill which would prohibit the sale of milk in plastic throwaway containers as of July 1, 1978. I will try to be very brief in my remarks because I know all of us are very anxious to get out for dinner and because we have alot of

[7] A transcription of the full floor debates in both houses of the Minnesota legislature was offered and admitted into evidence as Plaintiffs' Exhibit J. (T. 112, 113) Unless indicated, the spelling and punctuation employed in quotations from the debates corresponds to that of Plaintiffs' Exhibit J.

work to do later this evening. The bill is basically in response to the fact that we in Minnesota are on the verge of a massive market change over to the throwaway plastic container. The bill has a great deal of support. It has been passed by the House just recently and it has the support of the Pollution Control Agency, the Department of Agriculture, the Department of Natural Resources and Consumer Services Division as well as the Minnesota Energy Agency. The City of Minneapolis has passed an ordinance which bans the sale of these kinds of plastic throwaway containers in the City of Minneapolis and their intent in doing that was to give those of us here in the legislature the opportunity to make this decision on this particular issue before the plastic throwaway takes over the market in Minnesota. That ban enacted by the City of Minneapolis does end on June 1, 1977, only a few days from now. There is also a great of support for this legislature among the general public and a recent Minnesota poll -66% of the responses said the plastic throwaway is undesirable. First, before making any further comments, I want to point out that clearly the most preferable container system would be a returnable container system for milk delivery. A returnable milk delivery system based on a 50 trip returnable and based on 60,000,000 gallons of milk sold in gallon containers each year in Minnesota, would use 372 billion BTU's less petroleum and natural gas energy in a year than the throwaway plastic system which is being proposed by the opponents of this bill. That is enough energy in Minnesota, members of the Senate, to heat 3,100 homes for one year. In landfill space the throwaway plastic system requires 32 times the landfill space that a refillable plastic system does. A conver-

sion to the non-refillable plastic system at the present time normally requires a major capital investment on the part of the dairies. This creates a hardship on the small dairies of our state. That capitol investment has been estimated to be in the area of 300-400 thousand dollars and it would be extremely difficult for us to switch back to a refillable system which is, of course, the preferable system once that conversion to the throwaway plastic container is made. Secondly, there are very solid environmental, economic and consumer reasons to support the continued use of our paperboard system in Minnesota. I point out again as I said before that the move to the plastic would most likely preclude our future options to go into a returnable system. We all know that by the mid 80's we are going to run out of landfill space here in the metropolitan area, plastic is made of polyethylene which is a product of natural gas and petroleum, two our fuel resources which are in the shortest supply and while paperboard is made from trees, plastic is also non-biodegradable. Just to give you a couple figures, in a draft report prepared for the EPA by Midwest Research Institute, or MRI, it was found that the throwaway plastic uses a net of 2.88 million BTU's more petroleum and natural gas for every 1,000 gallons of milk than does the paperboard system. So based on 1,000 gallons of milk and in Minnesota we have 60,000,000 gallons of milk annually in gallon containers, this would mean that we could heat, just on the savings from staying with the paperboard containers rather than going with the plastic throwaway, we could heat 1,400 homes per year. Furthermore, the availability of natural gas and petroleum is declining and the price is going up, so from the standpoint of available

> reserves, and consumer prices, it is clear that going to our short supplies of natural gas and petroleum is not the way to go. Finally, I would just say that the opponents of this legislation will have many arguments to present to you, but I want to just leave you with this particular thought, and that is when the real direction that we should be headed in the state of Minnesota in terms of packaging, is a returnable system. It makes absolutely no sense for us to standby and permit this delivery system to go into another non-returnable system. *There will be arguments made here today about how the paperboard container is comparable to the throwaway plastic. That is not the issue that is before us. The issue before us is whether we should go into another throwaway plastic system that will be very, very difficult to convert from.* You all were here when we argued out the S.F. 1 dealing with the mandatory deposit bill and you heard the arguments and so you know how difficult it is to make that change once we permit that system to take over the market. It is clear from the evidence that I have seen that the throwaway plastic container will take over the market unless we act on this bill here this evening.

Plaintiffs' Exhibit J, Full Senate Floor Discussion, May 20, 1977, at 1, 2 (emphasis supplied).

The bill was supported by the Minnesota Department of Energy, the Minnesota Pollution Control Agency, the Minnesota Department of Natural Resources, the Minnesota Department of Agriculture, and the Consumer Services Division of the Minnesota Department of Commerce. (T. 142) Although the bill was approved on May 26, 1977, it has never been im-

plemented. Prior to the Act's effective date,[8] this action was commenced, and enforcement of the Act was enjoined.

V. Purposes Of The Act: Non-Proliferation Of Throwaways

At trial, evidence was offered concerning several of the purposes of the Act. The testimony of 15 witnesses (two of whom testified by deposition) and voluminous documentary evidence were admitted. Some of this evidence concerned the expressed legislative purpose of prohibiting the throwaway plastic container before it could become irreversibly dominant in the market and before there developed such economic reliance upon the plastic container—in the form of capital investment and employment—that eradication of this admittedly-bad container would entail great social and economic dislocation. This concern was expressed repeatedly during the legislative debates.

The bill's chief sponsor in the House of Representatives, Representative Willard Munger, argued that ". . . we need this legislation to stop the rapid change over in the dairy industry to plastic throwaways before it becomes a problem in the State of Minnesota,"[9] and warned that the bill was needed ". . . so that the plastic industry isn't going to get a strangle hold in Minnesota. . . ."[10] He explained:

> I think it is time to act on this legislation now. Minnesota's dairy market is on the verge of making a major change over from essentially a paperboard container sys-

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[8] As adopted, the Act was to take effect July 1, 1977. Minn. Laws 1977, ch. 268, § 3. The effective date was delayed to July 1, 1978, by Minn. Laws 1977, ch. 455, § 96.

[9] Plaintiffs' Exhibit J, House of Representatives, Floor Debates, March 10, 1977, at 1.

[10] Plaintiffs' Exhibit J, House of Representatives, Floor Debates, March 17, 1977, at 6.

> tem to a system of primarily single use, throwaway plastic bottles. The major dairies in our state have ordered the blow-mold equipment to manufacture in plant the non-returnable plastic milk bottle. Members of the House, I feel now is an ideal time for this legislation when only one dairy in our state is firmly established in manufacturing and marketing the throwaway plastic milk bottle.

Plaintiffs' Exhibit J, House of Representatives, Floor Debates, March 10, 1977, at 2.

Similar concerns were expressed in the Minnesota Senate, where Senator Allan Spear argued:

> This bill regardless of the particular merits of plastic milk bottles over paperboard milk bottles, this bill is designed to prevent the beginning of another system of non-returnables that is going to be very, very difficult once it begins. It is true that our alternative now is not a returnable system in terms of milk bottles. Hopefully we are eventually going to be able to move to that kind of a system, but we are never going to move to a returnable system so long as we allow another non-returnable system with all the investment and all of the vested interest that that is going to involve to begin. . . .

Plaintiffs' Exhibit J, Full Senate Floor Discussion, May 20, 1977, at 6.

One element of this concern was a recognition that once dairies were permitted to invest millions of dollars in machinery for the manufacture of plastic containers, and once jobs were created for their manufacture, it would become much more difficult to remove them from the marketplace. Senator John Milton urged:

> Here is an opportunity for us to stop something before it gets started. To stop something before everyone has to get this filling equipment. A year from now, two years from now, 5 years from now, 10 years from now they all come back and say, now if you guys had taken care of it then, that was the time to do it, but now we have got a 1,000 jobs in the state of Minnesota and now you can't do it, now you can't use those resources because it is going to cost jobs. The only way to go about these kinds of things is to take preventive medicine. . . .

Plaintiffs' Exhibit J, Full Senate Floor Discussion, May 20, 1977, at 6. Other legislators echoed this desire to address the problem while it was still "on the horizon."[11] Thus, the legislature viewed the impending move to in-house manufacture of throwaway plastic containers as likely to create a substantial barrier to any voluntary or mandated switch to returnables.

Plaintiffs' two principal expert witnesses conceded that their study of milk containers did not take into account the economic and social impacts of allowing or prohibiting particular containers, (T. 208, 209, Deposition of William Ades,[12] 31), even though they agreed that, in formulating container legislation, lawmakers should consider the effect of the legislation upon employment and capital investments, and the costs of redirecting capital investment. (T. 20, Ades Depo., 31) Witnesses for plaintiffs also indicated that, had the leg-

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[11] Plaintiffs' Exhibit J, Full Senate Floor Discussion, May 20, 1977, at 9, (remarks of Senator Schaaf). See also, remarks of Senators Luther, *Id.*, at 1, 2; and Perpich, *Id.*, at 10; and Representative Munger, *Id.*, House of Representatives, Floor Debates, March 14, 1977, at 1, 12, and March 17, 1977, at 4.

[12] This deposition and the exhibits thereto were admitted into evidence. (T. 274-279) This deposition is cited hereafter as "Ades Depo."

islature instead chosen to ban both the throwaway plastic container and the predominant paper carton, the economic disruption would have been far greater (T. 443), and dairies would have found themselves, at least temporarily, with no readily available package for their milk. (T. 474)

VI. Purposes Of The Act: Energy Conservation

A second concern of the legislature in adopting the Act was the conservation of nonrenewable fossil fuels. The polyethylene from which plastic milk containers are made is refined from either crude oil or natural gas. (T. 305, 306) At the present time, approximately 70 percent of this plastic is derived from natural gas. (T. 313)

Concern for the consumption of finite resources was prominent in the minds of the legislators in adopting this Act. The bill's chief sponsor in the House of Representatives stated:

> . . . A sweep to the plastic throwaway bottle in the gallon size container alone would use enough additional natural gas and petroleum to heat 3,100 homes each year in Minnesota when compared to a refillable system and 1,400 compared to the present paperboard system. Plastic containers are made from a non-renewable resource while the paperboard is made from Minnesota's forest products. The renewable natural resources are important to the forest industry and the economy of our state. . . . Plastic will increase energy consumption. This legislation will conserve a non-renewable natural resource, fossil fuels. It will use and help promote Minnesota's natural resources, wood fiber. It will help protect our environment. . . . The polyethylene used to make plastic milk containers is a derivitive of our fossil fuels which must

> be conserved for energy use. For every 1,000 gallons of milk packaged in plastic containers, 165 pounds of polyethylene is used compared to 20 pounds of polyethylene for the same amount of milk packaged in paperboard and I think that is very important. There is a ratio there of energy use. Nation wide in 1973 Americans threw away 140 million tons of solid waste. We spent 4-1/2 billion just to throwaway the throwaways. Our country can no longer afford this waste of our natural resources and we must change our sense of direction and I think this bill changes that sense of direction. . . .

Plaintiffs' Exhibit J, House of Representatives, Floor Debates, March 10, 1977, at 2.

Similarly, the chief Senate sponsor argued that "[w]e have been through an energy crisis in Minnesota. We know what it is like to go without and what we are looking at here is a total blatant waste of petroleum and natural gas . . ." Plaintiffs' Exhibit J, Full Senate Floor Discussion, May 20, 1977, at 12, (remarks of Senator Luther).

Senator David Schaaf reiterated this concern:

> . . . I don't know how many of the rural members have plastic trees in their backyard. But the petroleum products and the natural gas used in these things is an exhaustible resource. It is not a renewable resource. I think what we are saying here is that this is on the horizon; here and now is our chance to say look we are throwing those lighters, we are throwing away razors, we are throwing away everything in the world, all of our resources. Lets get this one before the economics of the packaging get so far out of hand that we won't be able to deal with this like we can't deal with ban-the-can.

Id. at 9.

Evidence at trial showed that the production of a single 65 gram one-gallon plastic container consumes roughly 3.39 cubic feet of natural gas for raw materials alone,[13] and that this natural gas could instead be used for many other purposes (T. 308, 317), including heating fuel. (T. 203, 313) Natural gas and oil exist in finite amounts and are non-renewable resources. (Ades Depo. at 43-44) It is not contested that in recent years the unavailability of sufficient supplies of oil and natural gas to meet heating and energy needs has caused great hardship in the United States.

In contrast, paperboard containers are produced primarily from wood pulp with only a thin coating of polyethylene, which comprises 10 percent, or slightly less, of the container by weight. (T. 40) There is no evidence that hardship has resulted or may be expected due to depletion of wood pulp resources, which, of course, are renewable.

Substantial evidence was also introduced concerning the separate question whether, regardless of the sources of the energy involved, fewer overall BTU's are consumed in producing one type of container than another. All parties relied upon a study prepared by the Midwest Research Institute for the United States Environmental Protection Agency. The report, entitled "Resource and Environmental Profile Analysis of Five Milk Container Systems," (hereinafter "MRI Report"), and admitted into evidence as Plaintiffs' Exhibit I, (T. 80) attempts to quantify some of the respective environmental effects of various types of milk containers. The findings of the MRI Report with respect to gallon containers are summarized in the following table:[14]

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[13] Plaintiffs' Exhibit M (T. 165-166) indicates that the raw materials (i.e., fossil fuels) account for 3,490,000 BTU's per 1,000 65 gm containers or 3,490 BTU's per container. Natural gas produces 1,030 BTU's per cubic foot in combustion. (Plaintiffs' Exhibit I, at 105, T. 80)

[14] The asserted interest of plaintiffs, and the focus of trial evidence, related to the gallon size container. Unless otherwise qualified, reference in this brief to a particular milk container is intended to refer to the gallon size.

TABLE 2

SUMMARY IMPACT DATA FOR 1,000 GALLONS OF MILK DELIVERED
(in one gallon containers by type of container system)

Impact category	Units	Milk Container Systems										
		Refillable Containers							Nonrefillable Containers			
		Glass Bottle			Plastic Bottle				Plastic Bottle	Paperboard Carton[a/]	Paperboard Carton[b/]	Plastic Pouch
		5-Trip	10-Trip	20-Trip	5-Trip	10-Trip	20-Trip	50-Trip	1-Trip	1-Trip	1-Trip	1-Trip
Raw materials[c/]	lb	954.15	480.03	242.97	21.88	14.83	11.31	9.20	17.70	238.88	238.88	2.34
Energy	10^6 Btu	7.42	4.41	2.90	4.98	3.08	2.13	1.56	8.78	6.20	8.62	3.59
Water	10^3 gal.	1.29	0.86	0.64	0.69	0.55	0.48	0.44	0.66	2.87	2.87	0.32
Industrial solid waste	cu ft	2.12	1.10	0.60	0.27	0.18	0.14	0.11	0.38	0.85	0.85	0.13
Atmospheric emissions	lb	32.67	20.93	15.07	19.80	13.70	10.67	8.81	30.86	26.08	26.08	14.02
Waterborne waste	lb	6.26	4.76	4.01	4.08	3.61	3.38	3.32	3.13	6.24	6.24	1.51
Postconsumer solid waste	cu ft	19.92	10.02	5.02	16.24	8.46	5.06	2.00	75.43	30.39	30.39	1.05

Source: Midwest Research Institute.

a/ Total energy without including energy derived from burning wood wastes.

b/ Total energy after including 2.42×10^6 Btu of energy derived from burning wood wastes.

c/ Hydrocarbon feedstocks are counted as energy rather than pounds of raw materials. Wood fiber, sand, etc., are counted as pounds of raw materials.

Plaintiffs' Exhibit I, at 8.

As this table shows, the MRI Report ranked the throwaway plastic container as the worst energy consumer among containers. This difference is even more pronounced if, in calculating the energy consumed in making paper cartons, credit is given for the energy recaptured by burning the wood wastes generated in making the cartons.

Plaintiffs offered testimony for the purpose of persuading the court to make several adjustments to these MRI figures. First, there was testimony to the effect that typical plastic containers are about 5 grams lighter than the 72.3 gram sample[15] used for the MRI study. (T. 66, Plaintiffs' Exhibit I, at 7) However, representative containers offered into evidence by plaintiffs weighed from 69.5 to 75.7 grams. (T. 341, 432-434)[16] Second, plaintiffs offered the testimony of MRI investigator Richard Welch that the "most appropriate" energy figures are those which deny credit for energy recaptured by burning wood wastes in the manufacture of paper cartons (T. 161-163), even though the MRI Report made no recommendation as to the treatment of this wood waste energy, and expressly left that choice to governmental decisionmakers.[17]

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[15] All weights stated include both the disposable plastic container and its disposable plastic cap or closure.

[16] In addition, a survey by the paper industry found that the 72.3 gram container and cap used for the MRI study was actually *lighter* than the average plastic containers in use (T. 231), and one of plaintiffs' witnesses testified that containers lighter than 70 grams sometimes leak. (T. 435, 436)

[17] Although this wood waste energy is, in fact, actually recaptured, and although the energy thus saved has no readily available alternative use as fuel, Welch contended that this recapture should not be credited because of the difficulty in obtaining comparable data on the use of "waste" gases, which he said were used to "power various processes" in the petroleum industry. (T. 162, 163) These petroleum "wastes" are primarily derivatives of natural gas, which could readily be used as fuel. (T. 202, 203) There was no evidence that wood wastes burned for energy in making cartons would be put to alternative uses if they were not burned.

(Plaintiffs' Exhibit I, at 4) Third, plaintiffs offered alternative energy calculations using different treatments of the energy value of raw materials.[18] If the MRI Report were redone along the lines plaintiffs' evidence proposed, then plastic containers would be found to consume somewhat less total energy than paper cartons.

Data compiled by a task force of the Ministry of the Environment of the Province of Ontario, Canada, also found the throwaway plastic container to be the greatest consumer of energy. The following table, reprinted from the Deposition of Giles Endicott, Exhibit 3, at 206 (Endicott Depo. 14),[19] shows the findings of the task force, using comparative ratios in which the impacts of returnable plastic bottles are set at 1, and using an 80-gram throwaway plastic bottle:

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[18] In calculating energy consumption, the MRI study included as energy the energy value of the natural gas and petroleum feedstocks used for the raw materials of the plastic container, but did not include the energy value of the wood pulp from which the paper carton is made. This approach reflected MRI's calculated judgment that petroleum and natural gas are nonrenewable, and that "energy is a more critical application of the petroleum and natural gas." (T. 161) One of the alternative calculations prepared by Welch excluded the energy value of fossil fuel feedstocks from the calculation for plastic jugs; the other alternative calculation included as energy the energy equivalent value of the wood pulp used in the paper carton. Both of these calculations denied credit for wood waste energy recaptured in making paper cartons. (Plaintiffs' Exhibit M)

[19] The Endicott deposition, with the exhibits thereto, was admitted into evidence at trial. (T. 375, 479, 480)

Estimated Solid Waste and Energy Requirements for Milk Containers by Size and Type for 3,000 Quarts of Milk Delivered

Table III.11.2

Consideration Area I

Container Size and Type	Estimated Solid Waste Generated for 3,000 Qts. of Milk Delivered: Weight (lbs.) (1)	Comparison Ratios Based on 3 Quart R.P.J. (2)	Rank	Volume (cu. ft.) (3)	Comparison Ratios Based on 3 Quart R.P.J. (4)	Rank	Container Energy Input for 3,000 Qts. of Milk Delivered (Million BTU's) (5)	Comparison Ratios Based on 3 Quart R.P.J. (6)	Rank
CATEGORY A: 3 Quart Size									
1. Paper Carton	365.00	55.2:1	5	17.05	51.7:1	4	2.19	10.9:1	4
2. Refillable Glass Bottle (2 Qt.)	172.95	36.0:1	3	2.46	7.5:1	3	2.13	10.6:1	3
3. Plastic Pouch	64.00	13.3:1	2	1.10	3.3:1	2	0.57	2.8:1	2
4. Refillable Plastic Jug	4.80	1.0:1	1	0.33	1.0:1	1	0.20	1.0:1	1
5. Non-refillable Plastic Jug	176.00	36.7:1	4	62.93	190.7:1	5	3.75	18.8:1	5

SOURCE: Solid Waste Generation Model, Part VI, Section 2, and Energy Model, Part VI, Section 3.

(*See* also Endicott Depo. 35, 36, 76. Endicott Depo. Exh. 13, at 251)

Aside from the question whether plastic containers consume more total BTU's, plaintiffs' witnesses,Welch and Ades, agreed that the renewability or nonrenewability of the resources consumed should be considered in packaging decisions. (T. 208, 209, 211, Ades Depo., 31) These witnesses conceded that, apart from the treatment of raw material energy values, the raw BTU figures calculated in the MRI Report do not attempt to take into account the nonrenewability of fossil fuel energy, or to give it any greater weight than energy from renewable sources. (T. 208, 209, 211, Ades Depo., 31, 43, 47)

VII. Purposes Of The Act: Solid Waste Disposal

A further concern expressed by Minnesota legislators prior to adoption of the Act involved the solid waste problems caused by throwaway packaging, particularly the landfill space which would be consumed by throwaway plastic jugs.[20] About ninety percent of post-consumer solid wastes are disposed of in landfills. (T. 67) The volume of waste materials is a key factor in solid waste management, (T. 495) and is the limiting factor in determining the life of most landfill operations. (T. 401, see also T. 228) Both the MRI Report and the Ontario study found that plastic throwaways would create a greater volume of solid waste than any other container studied. The initial draft version of the MRI Report had simply assumed that the paper and plastic containers would consume equal space in landfills. Subsequently, however, a study was performed by the Weyerhauser Company. (T. 63,

[20] *See e.g.*, Plaintiffs' Exhibit J, House of Representatives, Floor Debates, March 14, 1977, at 13, 14 (remarks of Rep. Forsythe); Full Senate Floor Discussion, May 20, 1977, at 1, 2 (remarks of Sen. Luther).

64, Plaintiffs' Exhibit O, T. 179) The Weyerhauser investigators had attempted to simulate the materials in a landfill (T. 176) and had used a testing device to measure the amount of pressure necessary to crush the two types of containers, the amount of pressure necessary to hold the containers in a crushed condition, and the tendency of the containers to spring back to their original shape and volume. They had also placed a 6-inch layer of dirt on the two types of containers and had found that the dirt was sufficient to hold the paper carton in its crushed state, but that the dirt would not hold the plastic container. (T. 176, 177) Based upon the Weyerhauser Report as the best available data, the final MRI Report was modified to show the plastic container taking more than twice the landfill space of paper. (Ades Depo., 14)

The State's expert witness, Harold Samtur, testified that milk cartons may occupy as much as 5 or 6 percent of the solid waste stream, by volume, depending upon the assumptions used (T. 616), and that milk containers are one of the largest single categories of packaging waste. (T. 553) Samtur testified that, on the basis of the Ontario study, the MRI Report, his personal experience with landfills, discussions with colleagues and a study on compactibility of different packaging materials, it was his expert opinion that plastic would consume significantly more space than paper, and that, while landfill disposal would reduce a paper carton to 10 percent or less of its original volume, a plastic jug would retain from 25 to 40 percent of its original volume. (T. 605, 606) It was therefore Samtur's expert opinion that banning the throwaway plastic milk container would reduce the volume of solid waste generated in Minnesota. (T. 557, 558)[21]

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[21] It was Samtur's further conclusion that if, by 1985, Minnesota were to convert to the use of refillable containers and plastic pouches, the volume of milk containers in the solid waste stream would be reduced by 96 percent. (T. 556)

Plaintiffs attacked this conclusion, but offered no documentation or study to support their own contention that plastic containers and paper cartons occupy equal space in landfills.[22] Instead, they attempted to discredit each of the studies and opinions supporting the ban on plastic.[23] Plaintiffs' witnesses Welch and Ades knew of no other compaction studies (Ades Depo., 14; T. 174) and acknowledged that the MRI figures were based upon the only documentation available, (T. 174) but they expressed less than complete confidence in the MRI/Weyerhauser figures, since they did not feel the study adequately simulated landfill conditions. (T. 174, Ades Depo., 15) Welch professed no expert knowledge of solid waste disposal,[24] but felt that it would have been very desirable to have had other compaction studies (T. 172-178), and Ades testified that the lack of an empirical data base made him less confident of the MRI waste volume figures than of MRI figures in other areas. (Ades Depo., 15) Ades was at least equally uncomfortable, however, with the notion that the two containers would occupy equal space. (Ades Depo. 32)

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[22] Plaintiffs did offer a courtroom demonstration in which one plastic and one paper container were carefully hand-folded as evidence of the spring-back tendencies of the two containers. Substantial evidence was also introduced by plaintiffs concerning landfill processes of crushing and covering and landfill problems relating to leachates and gases produced from decomposition.

[23] For example, plaintiffs dismiss what was called the "Eggshell Report" (See T. 512-517, 606, 607), a portion of which was admitted into evidence as Defendant's Exhibit 10 (T. 508, 516), because the study's findings as to the disposability of polyethylene containers did not focus specifically on polyethylene *milk* containers. They dismiss the findings of the Ontario study (Endicott Depo. Exh. 3) because they contend the 80-gram milk bottle considered there was too heavy. They attacked the MRI figures because the compaction study from which they were derived did not identify the weight of the containers used, and because they did not believe the study adequately approximated landfill conditions. (T. 173, 179)

[24] Welch testified: "I am not an expert so I don't know that much about landfills." (T. 214, see also T. 229) Welch also disavowed any expertise with regard to recycling (T. 204) or post-consumer waste disposal generally. (T. 229)

Whatever its degree of confidence, MRI determined that Weyerhauser figures were the best available data, and these figures were used in the MRI Report and accepted by the EPA. Ades testified that, if a lawmaker were concerned primarily with the two problems of solid waste volume and energy consumption, the MRI Report could support a decision to distinguish between plastic and paper milk containers. (Ades Depo., 35)

SUMMARY OF ARGUMENT

The State of Minnesota asserts that the Minnesota Supreme Court in declaring the Act violative of federal equal protection guarantees has attempted to assume the role of "super legislature" wisely abandoned by this Court decades ago. For many years this Court has admonished that the essential judicial power to invalidate legislation which plainly contravenes specific constitutional proscriptions must not be taken as license to assume the legislative function of judging the wisdom, expediency, or effectiveness of legislation. Nowhere has this principle been more strongly asserted than in areas of business and economic regulations neither involving invidious discrimination nor affecting basic civil rights. Such legislation must not be declared unconstitutional if there is any rational basis to think that some public interest may better be served by adopting the Act than by not adopting it. In this case, a number of legislative judgments, all consistent with logic, public policy, and evidence at trial, support the decision to ban throwaway plastic containers as part of broader efforts to address the problems of resource consumption and waste disposal associated with throwaway packaging.

Regardless of whether the throwaway plastic container is worse, environmentally, than the paper carton, it is clear that

both of these containers are much worse than the other available alternatives, returnables and plastic pouches. It is equally clear that the plastic container is a relative newcomer to the Minnesota market, and that, at the time the law was enacted, many major dairies were on the verge of purchasing expensive machinery to manufacture disposable plastic containers, but had not yet done so. The economic and social consequences of eliminating the plastic container in 1977 were much less severe than would have resulted from elimination of both the plastic and paper containers, which would have required near total conversion of all milk packaging at once. In addition, entrenchment and expansion of the plastic container would severely impair future movement toward greater use of returnable bottles and plastic pouches, both because of capital commitments and because of the overpowering consumer appeal of the plastic container.

Further, there is reason to believe the plastic container is worse, environmentally, than even the paper carton. Plastic containers consume more energy than other containers. Moreover, they are manufactured of material derived from scarce fossil fuels. Finally, there is evidence that plastic containers consume substantially more space in landfills than do paper containers. Thus, there exist reasonable bases for a legislative judgment that, from solid waste and fossil fuel perspectives, the plastic container is less desirable than the paper one. More importantly, however, there exist sound reasons for the Minnesota legislature to have acted first to stop economic entrenchment of the plastic container, even if the plastic and paper containers are both viewed as undesirable.

Plaintiffs and the Minnesota Court insist that both the plastic and paper containers be prohibited at once. It is, in the State's view, vitally important that legislatures be allowed the

discretion to begin with less restrictive measures to advance a public purpose rather than being compelled, under the guise of constitutional mandate, to take an all-or-nothing approach.[25]

ARGUMENT

I. EQUAL PROTECTION REVIEW OF ECONOMIC REGULATIONS IS EXTREMELY LIMITED.

The majority opinion of the Minnesota Supreme Court, declaring the Act invalid on federal equal protection grounds, reflects a total misconception of the appropriate standards of review, as set forth by this Court in numerous cases.

In undertaking such a review, a court exercises a very limited function. The question before the court is not whether the evidence of record preponderates in favor of, or against, the passage of a legislative enactment. Rather, the sole question for the reviewing court is whether, on searching the record and its own mind, the court can reasonably conceive of any facts which would justify the classifications made by the stat-

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[25] Plaintiffs have suggested that they may also assert in this Court commerce clause objections to the Act—an issue not decided by the Minnesota court. The State will respond, in its reply brief, to any commerce clause arguments which may be raised by plaintiffs. Although the Minnesota court did not reach the commerce clause issue in the instant case, however, it is worthy of note that in the case of *Can Manufacturers Institute, Inc. v. State of Minnesota*, 289 N.W.2d 416 (Minn. 1979), decided the same day as the instant case, the Minnesota Supreme Court upheld general packaging review legislation against commerce clause attack, holding that:

> [P]laintiffs' Commerce Clause attack would be persuasive only if it were clear on the record that the state's interests in reviewing packages as an element of its solid waste management program are illusory.

Id. at .

Thus, it is plain that, as indicated by Justice Wahl in dissent, correction of the Minnesota Court's erroneous determination of the Equal Protection issue is dispositive of any commerce clause claim.

ute.[26] If such facts are conceivable, the court's inquiry is complete: the statute must be sustained.

Thus, the regulation of wholly economic matters merits "only the mildest review under the Fourteenth Amendment."[27]

This observation is underscored by the fact that only once in the last half century has this Court overturned an economic regulation as violative of equal protection and even that aberation has since been overruled as erroneous.[28] As the now-unbroken line of this Court's decisions demonstrates, the burden of proof which must be sustained by a challenger is exacting indeed.

To sustain that burden, and to prevail in their assault upon the Act before the court, the plaintiffs must prove that the Act has absolutely no conceivable "basis in practical experience",[29] and that it cannot possibly reflect any "reasonable distinction, or difference in state policy."[30] That is, they must

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[26] McDonald v. Board of Election Commissioners, 394 U.S. 802, 808, 809 (1969); Allied Stores of Ohio v. Bowers, 358 U.S. 522, 528 (1959); McGowan v. Maryland, 366, U.S. 420 (1961); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

[27] Craig v. Boren, 429 U.S. 190, 207 (1976).

[28] Morey v. Doud, 354 U.S. 457 (1957), overruled, City of New Orleans v. Dukes, 427 U.S. 297 (1976).

[29] McGinnis v. Royster, 410 U.S. 263, 276 (1973), quoting South Carolina v. Katzenbach, 383 U.S. 301, 331 (1966). *See also* Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 488 (1955); Railway Express Agency v. People of State of New York, 336 U.S. 106 (1949).

[30] Allied Stores of Ohio, Inc. v. Bowers, *supra,* 358 U.S. at 528. The statute, of course, need not be drawn with " 'mathematical nicety' ", Dandridge v. Williams, 397 U.S. 471, 485 (1970), quoting Lindsley v. Natural Carbonic Gas Co., *supra,* 220 U.S. at 78. This Court has often recognized that the practical problems of lawmaking sometimes justify, and even require, "rough accomodations, illogical, it may be, and unscientific," Metropolis Theater Company v. City of Chicago, 228 U.S. 61, 69, 70 (1913) and has acknowledged that " 'the demand for perfection must inevitably compromise with the hard facts of political life. . . .' " Vance v. Bradley, 440 U.S. 93, 108, n. 26 (1979), quoting Tussman and ten Broeck, The Equal Protection of the Laws, 37 *Calif. L. Rev.* 341, 350 (1949).

refute every conceivable basis for the law, and they must do so so thoroughly as to leave no reasonably doubt of the Act's unconstitutionality.

The significance of this "conceivable basis" standard is that a reviewing court does not sit to determine whether *it* is persuaded that the legislative facts and judgments underlying a statute are true, but only to determine whether the *legislature* could have conceived them to be true. Thus, the court does not sit as the arbiter of legislative fact, and is not at liberty to re-determine the facts as found by the legislature.[31] As this Court has recently observed:

> In ordinary civil litigation, the question frequently is which party has shown that a disputed historical fact is more likely than not to be true. In an equal protection case of this type, however, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based *could not reasonably be conceived to be true by the governmental decisionmaker.* [citations omitted]. As we have said in a slightly different context:
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> *'The District Court's responsibility for making "findings of fact" certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion* or even to reject the legislative judgment on the

[31] In this respect, the function of the reviewing court is analogous to that of a judge who sits with a jury in a criminal case, where the prosecution must negate every reasonable possibility of innocence. All admissible evidence, whether incriminating or exculpatory, must go to the jury. It is for the jury, and not the judge, to weigh the credibility of the evidence and to determine its significance and the inferences to be drawn therefrom. The jury's determination will not be set aside by a court unless it is inconceivable that a reasonable person could find as the jury did. Here, the fact-sifting "jury" is the legislature itself, and its determination may not be set aside merely because a court might have been persuaded to reach a contrary determination.

> basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than what the District Court in this case said was pure speculation.' *Firemen v. Chicago, R.I. & P. Co.*, 393 U.S. 129 (1968) at 138-139, 89 S.Ct. at 2567.

Vance v. Bradley, 440 U.S. 108, 110, 111 (1979), (emphasis supplied).[32]

Thus, it is not the province of the court to sift and weigh conflicting evidence supporting, or opposing, a statute. The merits of the statutory classification "are not to be weighed in the judicial balance and the classification rejected merely because the weight of the evidence in court appears to favor a different standard."[33] Nor may the court "hear and examine evidence for the purpose of deciding again a question which the legislature has already decided."[34] Rather, once the legislature has drawn a classification, "neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it."[35] The function of the court, therefore, is merely to make sure that the legislature has exercised a reasoned judgment and not to exercise or substitute its own judgment.

This principle is crucial here. Equally significant is the inextricable corollary that if the factual determinations underpinning a statute are at least fairly debatable, the statute can-

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[32] *See also* McGinnis v. Royster, *supra*, 410 U.S. at 274, (finding that the legislature "could have concluded rationally that" certain facts were true); Williamson v. Lee Optical of Oklahoma, Inc., *supra*, 348 U.S. at 489, (holding that "[e]vils in the same field may be of different dimensions and proportions, requiring different remedies. *Or so the legislature may think.*") (emphasis supplied).

[33] Clark v. Paul Gray, Inc., 306 U.S. 583, 594 (1939).

[34] *Id.*

[35] United States v. Carolene Products Company, 304 U.S. 144, 154 (1938).

not be overturned.[36] Nor may the court substitute its view on debatable questions of social or economic policy for the judgment of the legislature.

> " 'Whether the enactment is wise or unwise, . . . whether it is based on sound economical theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and *the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.*' "

Bayside Fish Flour Co. v. Gentry, 297 U.S 422, 428 (1936), *quoting* Chicago, B. & Quincy R. R. Co. v. McGuire, 219 U.S. 549, 569 (1911).[37]

Nor is it the business of the court to hypothesize about the feasibility of possible alternative statutory classifications[38] or to decide for itself whether a statute will ultimately achieve its purposes. This principle was reiterated by this Court

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[36] *See e.g.*, United States v. Carolene Products, *supra*, 304 U.S. at 154, upholding the regulation of interstate commerce in filled milk products, where the decision to regulate was "at least debatable"; Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 430 (1936), refusing to consider arguments against a statute regulating fish processing, where the arguments did "no more than demonstrate that the question is debatable"; Euclid v. Ambler Realty Company, 272 U.S. 365, 388 (1926), holding that if the validity of the classification contained in a zoning ordinance "be fairly debatable," the legislative judgment must control.

[37] It is significant that in the Bayside Fish Flour case, *supra*, this Court sustained the dismissal of a complaint challenging the statute in question. This Court had no hesitation in rejecting the challenge and the allegations of the complaint, without requiring evidence of record to support the statute, and without affording the challengers an opportunity even to present factual evidence in support of their challenge.

[38] Caban v. Mohammed, 441 U.S. 380, 393, n. 13 (1979); Lalli v. Lalli, 439 U.S. 259, 274 (1978); Matthews v. Lucas, 427 U.S. 495, 515 (1976).

recently in upholding a Maryland statute requiring divestiture of service stations owned by oil refiners, despite the refiners' argument that the law would defeat its own purposes. This Court held:

> The evidence presented by the refiners may cast some doubt on the wisdom on the statute, but it is, by now, absolutely clear that the Due Process Clause does not empower the judiciary "to sit as a 'superlegislature to weigh the wisdom of legislation'. . . ." *Ferguson v. Skrupa*, 372 U.S. 726, 731, 83 S.Ct. 1028, 1032, 10 L.Ed.2d 93 (citation omitted). . . . Appellants argue that [the statute] . . . is irrational and that it will frustrate rather than further the State's desired goal of enhancing competition. But, as the Court of Appeals observed, *this argument rests simply on an evaluation of the economic wisdom of the statute*, 279 Md., at 428, 370 A.2d, at 1111, and cannot override the State's authority "to legislate against what are found to be injurious practices in their internal commercial and business affairs. . . ." *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536, 69 S.Ct. 251, 257, 93 L.Ed. 212. *Regardless of the ultimate economic efficacy of the statute*, we have no hesitancy in concluding that it bears a reasonable relation to the State's legitimate purpose in controlling the gasoline retail market, and we therefore reject appellant's due process claim.

Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124, (1978) (emphasis supplied).[39]

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[39] *See also* Bayside Fish Flour Co. v. Gentry, *supra*, 297 U.S. at 427, 428, in which this Court stated:

> These provisions have a reasonable relation to the object of their enactment . . . and we cannot invalidate them because we might think, as appellant in effect urges, that they will fail or have failed of their purpose.

Thus, based on a now unbroken line of cases stretching over generations, it is manifest that an economic regulation may not be set aside merely because the court is unconvinced of its wisdom or utility. Rather, the statute must be upheld if, on the basis of logic, inference, judicial notice, evidence of record, or merely on searching its own mind, the court can conceive of any reasonable "basis in practical experience"[40] for the statutory classification, or any combination of legitimate public objectives which may be furthered by the statute. It follows from this that the statute must be sustained if there exists any line of rational thought which supports the view that some public purpose will be better served by passing the Act than by not passing it. The State further submits that this "conceivable rational basis" standard precludes the invalidation of a statute unless a challenger has proven that the statute is either (a) logically inconsistent with the furtherance of any possible public purposes, or (b) necessarily dependent upon factual premises which have been shown, beyond any reasonable debate, to be false.

These principles have been applied by this Court in two cases strikingly similar to the case at bar. In *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949), this Court upheld a local ban on some, but not all, advertisements mounted on vehicles. Specifically, the regulation banned the use of advertising vehicles, generally, but permitted delivery vehicles to display advertisements for the vehicle owners' own products. This Court quickly dismissed a substantive due process challenge to this regulation, holding that the regulation's alleged relation to traffic safety had not been shown to be "palpably false", and that a court does not sit to weigh evidence,

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[40] McGinnis v. Royster, *supra*, 410 U.S. at 276, quoting South Carolina v. Katzenbach, *supra*, 383 U.S. at 331.

to determine whether a regulation is appropriate, or to pass judgment on its wisdom.

The Court then turned to the contention that the exemption for owner-displayed advertisements had no relation to traffic safety, and thus denied equal protection. The Court held:

> The local authorities may well have concluded that those who advertised their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case. If that judgment is correct, the advertising displays that are exempt have less incidence on traffic than those of appellants.
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> We cannot say that that judgment is not an allowable one. Yet if it is, the classification has relation to the purpose for which it is made and does not contain the kind of discrimination against which the Equal Protection Clause affords protection. It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered. And *the fact that New York City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category, such as the vivid displays on Times Square, is immaterial.* It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.

Railway Express Agency v. New York, supra, 336 U.S. at 110 (emphasis added, citations omitted).

Most recently, this Court reached the same conclusion in *City of New Orleans v. Dukes,* 427 U.S. 297 (1976), in upholding

an ordinance which banned the sale of food from some, but not all, pushcarts in the historic French Quarter of New Orleans. Specifically, the ordinance contained a "grandfather clause" which effectively authorized several pushcart vendors to continue operation. The Fifth Circuit Court of Appeals had held that there was no rational basis for this grandfather clause. This Court's analysis, and its grounds for reversing the Court of Appeals, are highly instructive, if not dispositive, in this case. The Court stated:

> When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. . . . States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distrinctions may be made with substantially less than mathematical exactitude. *Legislature may implement their program step by step, . . . in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.* . . . In short, the judiciary may not sit as a superlegislature to judge the wisdom of desirability of legislative policy determinations made in areas that neither affect fundamental rights not proceed along suspect lines, . . . in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment. . . .
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> . . . .
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> It is suggested that the "grandfather provisions," allowing the continued operation of some vendors was a totally arbitrary and irrational method of achieving the city's

purpose. *But rather than proceedings by the immediate and absolute abolition of all pushcart food vendors, the city could rationally choose initially to eliminate vendors of more recent vintage. This gradual approach to the problem is not constitutionally impermissible.* The governing constitutional principle was stated in *Katzenbach v. Morgan, supra,* 384 U.S., at 657, 86 S.Ct., at 1727:

> "[W]e are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' *Roschen v. Ward,* 279 U.S. 337, 339, 49 S.Ct. 336, 73 L.Ed. 722, that *a legislature need not 'strike at all evils at the same time,' Semler v. Dental Examiners,* 294 U.S. 608, 610, 55 S.Ct. 570, 571, 79 L.Ed. 1086, and that *'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' Williamson v. Lee Optical Co.,* 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563."

City of New Orleans v. Dukes, supra, 427 U.S. at 303-305, (citations and footnote omitted, emphasis supplied).

Has the Minnesota Supreme Court applied the foregoing principles in its analysis, the instant Act would necessarily have been upheld. It is this failure to adhere to the appropriate standards of review which explains the erroneous result below. It is therefore essential that these governing standards be kept firmly in mind in reviewing the decision of the Minnesota Court.

II. THE OPINION OF THE LOWER COURT, ON ITS FACE, COMPELS REVERSAL.

The Court need look no further than the written opinion of the Minnesota Supreme Court to see that the Act meet constitutional standards. That opinion recognizes that the Act deals with legitimate state interests. (A-35) Furthermore, it recognizes that there is evidence both in support of, and against, the Act's wisdom and utility in meeting public needs.

The court's "yes, but . . ." analysis of the record and arguments clearly demonstrates the existence of debatable factual and policy issues, the resolution of which ought to be left to the legislature, and the very existence of which must preclude any constitutional invalidation of the Act under general Fourteenth Amendment standards. The Minnesota Supreme Court, however, apparently shared the trial court's mistaken view that, because voluminous evidence was introduced, "[t]he Court, as fact-finder, is obliged to weigh and evaluate this evidence, much of which was in sharp conflict." (Opinion of District Court, at A-25) Thus, the court undertakes an exhaustive process of sifting and weighing the evidence, in direct disregard of this Court's repeated pronouncements.

First, the Minnesota Court undertakes to resolve, contrary to the legislative determination, conflicting evidence concerning solid waste and energy distinctions between the plastic and paper containers. Thus, the Minnesota Court concedes that both the MRI Report and the opinion of a solid waste expert indicate that the plastic container consumes more landfill space than any other container, but the court goes on to balance that evidence against non-expert testimony, deciding that the State's solid waste data is "inconclusive" and not "convincing". (A-37, 38) Therefore, rather than asking

whether evidence supports the *legislature's* determination, the court holds only that "[t]he *trial court's* finding that plastic nonrefillables and paper containers occupy the same amount of landfill space is also justified by the evidence." (A-26, emphasis supplied)

Likewise the court conceded that MRI figures support the conclusion that plastic containers consume more energy than paper ones. (A-40) But the court goes on to determine whether other figures, assuming a lower container weight, and ignoring energy recaptured from wood wastes, provide a more "meaningful" comparison. (A-40, 41)

In addition to resolving such factual disputes against the legislative judgment, the court undertook to evaluate the legislative policy of proceeding one step at a time in seeking to discourage non-returnable containers by first banning the plastic container. The court recognized that plastic containers are highly fossil fuel intensive in comparison to paper containers, which use renewable wood products (A-42), but went on to ask whether it felt that the amount of oil and gas which would be saved is significant or "negligible". (A-41, 42) The court concluded that the millions of cubic feet of natural gas involved are too small a volume for legislative attention.

The Minnesota Court further acknowledges the possibility that the legislature may have sought to prevent irreversible capital investments in the throwaway plastic container. In response, the court notes only that throwaway plastic containers were already being sold in "many areas of the state". (A-44) Furthermore, the court fails to respond to the obvious observation that promotion of the preferable returnable and pouch containers would be more difficult if economic reliance upon the plastic container were to become a fixed addition to the existing reliance upon paper containers. Rather, the

court simply declares that it is "uncertain" whether further legislation concerning the paper container will later be enacted (A-44) and that it is not proven that paper containers will "cease to be used". (*Id.*) Based on scant evidence, the court then undertakes to predict that a market without throwaway plastic containers will never, in any case, move more to returnables. (A-42) Nowhere does the court discuss the relative competitive strength of the plastic and paper gallons. Neither does the court address the economic and social consequences of banning both the plastic and paper containers at once, a step which would force most dairies to totally convert all packaging systems. As Justice Wahl further notes, the majority wholly ignores the merits of the pouch container which has enjoyed substantial market success in Canada (A-49), and which may well gain acceptance in Minnesota if throwaway plastic jugs are eliminated. Thus, the opinion of the Minnesota Court demonstrates plainly that there exist issues of fact and policy which call for evaluation of the weight and emphasis to be accorded conflicting information, and for the drawing of inferences therefrom, to determine whether the Act will further the admittedly legitimate interests of the State. The very existence of such questions requires that their resolution be left to the true finder of fact and determiner of policy in this case, the legislature.

III. THE RECORD ALSO SUPPORTS THE CONSTITUTIONAL VALIDITY OF THE ACT.

Even if this Court finds it necessary to go beyond the face of the Minnesota Court's opinion and to inquire into the evidence adduced at trial, it is apparent that the decision of the Minnesota legislature to prohibit plastic containers in 1977, but not simultaneously to prohibit paper containers, is rationally related to legitimate state interests and is nor arbitrary.

A. The Act Is Rationally Related To The Encouragement Of Environmentally Superior Containers.

There is no dispute that the legislature may properly be concerned with the problems of resource use and solid waste disposal attributable to throwaway packaging.[41] It is furthermore apparent that conservation of energy in general, and fossil fuel in particular, are matters of vital public concern. Disposable milk packaging constitutes a portion of the general problem of disposable packaging.[42] Thus it can hardly be

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[41] Solid waste, particularly solid waste from packaging, is an increasingly serious problem both nationally and in the State of Minnesota. National solid waste generation of 144 million tons in 1973 is estimated to reach 200 million tons by 1985. (T. 493, 494) In 1974, 1.25 million tons of solid waste was generated in the Twin Cities Metropolitan Area alone. (T. 496) Approximately 35 percent of municipal solid waste is attributable to packaging. (T. 494) While waste figures relating to weight are helpful, volume is of greater concern in disposal since the vast majority of solid waste is dealt with by means of disposal in landfills and dumps. (T. 495)

[42] A study by Franklin Associates Ltd. indicated that in 1973, milk containers accounted for an estimated 115,000,000 cubic feet of such waste nationwide. (Plaintiffs' Exhibit Q, at 22, T. 189, 190) This figure represents 1.15-2.3 percent of total solid waste by volume as opposed to about .36 percent by weight. (*Id.* at 17) The State's expert witness, Harold Samtur, testified that, if the MRI Report's figures on waste volume are correct, milk containers may actually constitute 5 or 6 percent of the volume of solid wastes. (T. 616)

said that the prohibition of the plastic container conflicts with the overall goal of discouraging such containers and encouraging containers which cause fewer environmental problems. If it would be rational and proper for the legislature to strive ultimately to eliminate both the plastic and paper containers, it is simply wrong to say that prohibition of the plastic container is not rationally related to that end.

In its decision below, however, the Minnesota Court sought to predict for itself whether the prohibition of the plastic container, at one point in time, would, by itself, significantly reduce the impacts associated with throwaway containers in general. The Minnesota Court's "finding" that it is conclusively established that the Act will not encourage the use of returnables is no more than the sheerest speculation. The prohibition of the plastic milk container, by itself, may lead to slowing or reduction in adverse environmental impacts, or further legislative action may be called for, but such things may be determined only with time and study. Since the Act has never been permitted to take effect, however, its potential effects cannot be known with certainty. As articulated well by Mr. Justice Frankfurter in *Am. Fed. of Labor v. American Sash & Door Co.*, 335 U.S. 538, 553 (1949) (concurring opinion):

> Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a court debilitates popular democratic government. Most laws dealing with economic and social problems are matters of trial and error. That which before trial appears to be demonstrably bad may belie prophecy in actual operation. It may not prove good, but it may prove innocuous. But even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that

> the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibility from those on whom, in a democratic society, it ultimately rests—the people.

Even if it were the business of the courts to determine whether a statute will or will not work, there is no compelling basis for the Minnesota Court's prediction. On the contrary, there is good reason to hope that the Act, once implemented, will not only be a holding action, as intended, but will also actually spur movement toward greater use of better containers. At trial there was conflicting speculation on this question. (*See, e.g.*, T. 339, 416, 569)

Some of plaintiffs' witnesses testified that their dairies' present intention, if the Act is upheld, is simply to return to use of the paper carton, rather than one of the better alternative containers. (T. 427) We know several things from the evidence, however. Before the plastic jug was introduced nationally, paper cartons had been "hovering" at 60 to 70 percent of the market (T. 76, 77) for at least a decade, with the remaining market shares held, apparently, by pouches or returnables. This suggests that these preferable containers were able to hold onto some stablized portion of the market. In Minnesota, at the time of trial, a number of dairies were still marketing returnable bottles. (T. 355, 356, 466, 467, 562, 563) Evidence nationally suggests, however, that once throwaway plastic jugs are permitted to take over the Minnesota market, these returnable bottles will disappear. (*See, e.g.*, T. 76, 420) According to plaintiffs' witness Robert Michael, consumers will, if given free choice, select the throwaway plastic jug over any returnable container. (T. 424, 425) Further, once dairies purchase expensive blow-molding machin-

ery, the dairies tend to adopt an offensive, rather than defensive, marketing strategy, and to "push" plastic jugs in order to reduce their per-gallon costs. (T. 436, 437) Thus, the plastic container tends to skew packaging choices, and to stack the deck against any movement to preferable containers.

Once this seductive option is removed, it is reasonable to believe that returnables and plastic pouches will have greater likelihood of success. The gallon paper carton is "probably the most cumbersome and least well thought of package in the entire industry." (T. 450) The possibility of further legislative action to ban the paper carton will also tend to discourage long-term investments in the manufacture of the carton. As dairies search for a better package, they are likely to look closely at both the plastic pouch and returnables, particularly if their investment capital is not tied up in machines for the manufacture of throwaway jugs.

It is quite possible, therefore, that returnables will make a comeback. With growing environmental consciousness, more consumers may well be willing to accept the slight inconvenience of returning empty bottles. Plaintiff Clover Leaf Dairy itself, in a 1976 letter to Minnesota legislators, acknowledged that "we *know* that the returnable system is environmentally superior." (T. 361, emphasis in original) The mere fact that Clover Leaf was unsuccessful in a 4-month experiment with returnables in 1976 (T. 334)—a fact cited by the lower court—is hardly reason to conclude that returnables cannot be sold, particularly in view of the fact that Clover Leaf had demanded an unrealistically high deposit of one dollar per bottle (T. 369), the full amount Clover Leaf had paid for the bottles when it purchased them. (T. 339)

In addition, more dairies may move to the plastic pouch, which has had great success in Ontario, even before the throw-

away plastic jug was banned there. (Endicott Depo. Exh. 6 at 2, 5, 6) In the four years prior to that 1972 ban, the plastic pouch had moved from 0 to 13 percent of the Ontario market. (Endicott Depo. Exh. 6 at 5, Endicott Depo. 21)[43] Plaintiffs' witness Robert Michael, who had never actually seen the pouch container (T. 444), testified that his dairy, Wells, had bought out another dairy which was selling milk in pouches, but had immediately discontinued the sales in order to go to the disposable plastic jug. (T. 444, 445) In view of the uncontested environmental advantages of the pouch, and in view of the fact that many dairies already market larger pouches for commercial and institutional use (T. 334, 421, 422), it is not unreasonable to hope that, once the plastic jug is gone, dairies such as Wells will consider use of the pouch.

Thus, the Act may well lead to greater use of better containers. If this expectation is not realized, and if the Act serves only as a holding action, to prevent entrenchment of an undesirable container, it may later prove necessary to take a second step, and to ban paper cartons, as was done in Ontario. (Endicott Depo. 8-10) In either event, the Act will have furthered legitimate public purposes.

Furthermore, the decision to prohibit the plastic container initially, rather than the paper one, or both containers, is rational despite the argument that environmental and resource goals might be more quickly accomplished by simultaneous prohibition of both plastic and paper containers. As in the case with substantive due process analysis, a determination to take a particular regulatory first step as opposed to some other step need only have a rational basis. *See, e.g., City of New Orleans v. Dukes, supra.* Clearly, the decision of the

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[43] By 1976, pouch containers held 40 percent of the Ontario market. (Endicott Depo., Exh. 6 at 5)

Minnesota legislature, to prohibit the plastic container at once and defer any action on the paper container, was neither arbitrary nor irrational. Numerous factors may have legitimately distinguished the two containers in the legislative mind.

B. The Act Rationally Minimizes The Economic And Social Dislocation Associated With Movement Toward Greater Use of Environmentally Superior Containers.

First, by acting when it did, the legislature had the opportunity to prevent major, long-term financial commitments to the establishment of another undesirable container system. In 1976, the paper container had predominated in Minnesota for many years. (T. 76) Use of the paper carton requires the purchase of blanks which are formed, filled and sealed on machinery which is leased, rather than owned, by the dairy. (T. 247, 248) Despite the national trend, the plastic system was late in arriving in Minnesota. (T. 295) In 1976, only one dairy in Minnesota had invested in the machinery necessary to produce the plastic container. (T. 458, 459) In late 1976, however, numerous Minnesota dairies were on the verge of substantial investments in blowmolding equipment needed to produce the plastic container. (Defendant's Exhibit 1, T. 259-263, 628) In fact, six dairies had placed orders for such machinery, which costs hundreds of thousands of dollars per machine. Given the legitimate concern of the State over the impacts of such throwaway containers, the legislature could plainly see[44] the purpose in preventing substantial new commitments to a system of throwaway containers which consume substantial quantities

[44] *See* statements of Senators Luther and Spear, *supra*, pp. 8-11, 13.

of fossil fuels,[45] only to become a waste disposal problem after a single use.

Thus the legislature acted, not to promote the paper container, but to prevent the unnecessary establishment of economic commitment to, and reliance upon, the plastic container. The prohibition of both the plastic and paper containers at once, however, would have presented an entirely different question. While substantial widespread economic commitment to the plastic container had not yet occurred in Minnesota, nearly all dairies were already selling most of their milk in paper containers of various sizes.

This Court has itself recognized that differing levels of established economic reliance constitute a rational basis for step-at-a-time regulation, even where this approach leads to distinctions between individuals involved in exactly the same activity. In *City of New Orleans v. Dukes, supra,* 427 U.S. at 305, for example, the Court noted that:

> rather than proceeding by the immediate and absolute abolition of all pushcart food vendors, the city could rationally choose initially to eliminate vendors of more recent vintage. . . .
>
> The city could reasonably decide that newer businesses were less likely to have built up substantial reliance interests in continued operation in the Vieux Carre and that the two vendors who qualified under the "grandfather clause"—both of whom had operated in the area for over 20 years rather than only eight—had themselves become part of the distinctive character and charm that distinguishes the Vieux Carre.

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[45] *See* discussion, *infra,* pp. 49-52.

Indeed, recognition of more established interests is the basis of every sort of "grandfather" provision. The legislature may rationally direct its efforts toward newly established aspects of a larger problem, so as to prevent the proliferation of the evils with which it is concerned. *See, e.g., United States v. Maryland Savings-Share Insurance Corporation*, 400 U.S. 4, 6, 7 (1970).

The simultaneous prohibition of both plastic and paper containers could easily have been perceived to present serious economic and social problems not associated with prohibition of the plastic container. Minnesota dairies would have been required to completely convert their bottling and delivery systems at once. Compelled complete and simultaneous conversion could well have led to serious difficulties in obtaining, installing, financing and learning the equipment and systems needed for returnable or pouch delivery. Aside from the potential hardships to the dairies themselves, any inability to convert smoothly or on time could result in temporary inability to deliver milk in adequate quantities, or at all. (*See, e.g.*, T. 474)

Such a situation would both deprive consumers of a vital commodity and reduce or eliminate the ability of dairy farmers to sell their product. It cannot be denied, therefore, that in moving to discourage one-way containers, the legislature could recognize the obvious difference between halting the onslaught of the plastic gallon container, and compelling the simultaneous industry-wide conversion of nearly all existing packaging systems.

C. The Act Rationally Eliminates The Single Greatest Competitive Barrier To Acceptance Of Superior Containers.

Second, the legislature may well have viewed the plastic container as constituting a greater competitive barrier to acceptance of returnable or pouch containers than the paper container. It is clear that the paper gallon container is not popular with consumers. It is awkward, subject to leaking and breakage and difficult to seal. (T. 77, 78, 450)

The disposable plastic container, on the other hand, is a favorite from a pure convenience standpoint, as demonstrated by its rapid rise in popularity. Therefore, it may be expected that consumers would more readily accept returnables or pouches as an alternative to the paper container than as an alternative to the more seductive plastic jug. Furthermore, to the extent the dairy industry has capital to expend in moving away from paper to other packaging, the likelihood of movement to returnable or pouch containers is reduced or eliminated if that capital is committed to the plastic throwaway jug.

Thus, by removing the plastic non-returnable as potential competition for the consumer's attention and the dairies' investment dollar, the chances that such attention may be directed to other, preferable alternatives is markedly improved. Whether or not the Act will, in fact, achieve the hoped-for results remains to be seen. Its enactment is, in any event, fully consistent with its goals. Therefore, quite apart from the question of whether the plastic or paper container is the "worst" in any particular environmental category, there exist legitimate policy reasons for the legislative decision to move first to head off the plastic container. The Minnesota Court,

however, almost totally ignored these concerns, stressing instead the question of whether in the court's opinion the plastic or paper container was the worst, environmentally. Even with respect to this question, however, there exists evidence that with particular respect to energy and disposability it is not irrational for the legislature to view the plastic container as having the worst impact of all available containers, including paper.

D. The Act Is Rationally Related To Goals Of Energy Conservation.

The Court can take judicial notice of the dire situation in this country and throughout the world with respect to supplies of petroleum and natural gas. Monumental efforts are underway at all levels of government to eliminate unnecessary consumption of these resources and to shift usage where possible from oil and natural gas to other resources which are either renewable or more abundant.

This is not an altogether recent phenomenon. For example, in *Walls v. Midland Carbon Company, et al.*, 254 U.S. 300 (1920), this Court upheld a Wyoming law aimed at the elimination of wasteful and extravagant use of natural gas. In *F.P.C. v. Transcontinental Gas Pipe Line Co.*, 365 U.S. 1 (1961), the Court took notice of the fact that, even then, "No one disputes that natural gas is a wasting resource and that the necessity for conserving it is paramount." (*Id.* at 8, footnote omitted) There, this Court upheld an F.P.C. action based, in part, upon the determination that use of gas in industrial boilers was an inferior use for gas and alternative fuel sources should be favored. No one would argue here that the need for conservation is less acute for oil. Given the problems of

the times it cannot be said that a legislative effort to prevent waste of such important resources is improper. One can hardly conceive of a more frivolous and extravagant use of such resources than to convert them into a product which is used once and thrown away, where legitimate, readily available alternatives exist.

The plastic container at issue here is made from high density polyethylene, which is produced from oil and natural gas feedstocks. (T. 305, 306, 313) In raw materials alone, a single 65-gram plastic container consumes 3.388 cubic feet of natural gas.[46] A single 70-gram container requires 3.64 cubic feet of natural gas, in raw materials alone.[47]

In contrast, except for a thin low density polyethylene coating, the paperboard container is made from wood, a renewable resource. In addition, 28 percent of all the energy consumed in the process of manufacturing, filling and delivering a gallon of milk in a paper container is derived from burning wood wastes. (See Table, p. 18, *supra*)

While plastic refillables are also made from polyethylene, the fact that these containers can be reused more than 150 times (Plaintiffs' Exhibit I, at 49, Endicott Depo., at 90, 91) reduces proportionally the amount of fossil fuels devoted to delivering a single gallon of milk. Likewise, the plastic pouch consumes much less fossil fuel per gallon of milk.

Therefore, the legislature plainly could conclude that the throwaway plastic container represents an unnecessary waste of fossil fuel in light of the fact that other available containers would require much less consumption of oil or natural gas for the delivery of a gallon of milk to the consumer.

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[46] See footnote 13, *supra*.

[47] This figure is derived by extrapolating the figure for a 65-gram container, as calculated in footnote 13, *supra*.

Furthermore, the gross energy data complied in the MRI Report demonstrates that the plastic container is the greatest overall energy consumer. The distinction is particularly pronounced when the paper container is credited for power generated from wood wastes. *See* page 18, *supra*. The Minnesota Court, however, was not content simply to determine whether there exists some basis upon which the legislature may have distinguished between plastic and paper on energy grounds. Instead, after conceding that the figures in the MRI Report support such an energy distinction, the court went on to determine that *if* those figures are used selectively and modified to assume lower container weights,[48] then the energy distinctions are "eroded." This approach inverts the well-established rule that, in constitutional litigation of this type, the issue is whether any view of the evidence *supports* the legislative judgment and not *vice-versa*. There is no reason why the legislature is compelled, as a matter of law, to share, in the face of contrary evidence, the Minnesota Court's assumption that all plastic containers weigh 65 grams. Neither must the legislature ignore the fact that a large amount of the energy used to produce paper containers is generated from waste wood, simply because plaintiffs assert that the petroleum industry also uses unspecified quantities of so-called "waste" gases to power "various processes." Neither must the legislature accept the Minnesota Court's unlikely proposition that the amount of fossil fuel used for non-fuel purposes will be unaltered. In fact, Phillips Petroleum Com-

[48] (A-41) The court's determination that the average plastic container weight in Minnesota is 65 grams, ignores the fact that representative containers introduced at trial by plaintiffs weighed up to 71.4 grams, (T. 341, 432-434) and that the plastic closures introduced at trial weighed nearly twice as much as those assumed in the MRI Report.

pany, as a plaintiff, claims that its sale or natural gas derivatives for milk bottles will be reduced if the Act is upheld. It is logical to assume that if less of these derivatives is sold, less will be produced. If less is produced, the fuel feedstock will be available for other uses.

Thus, despite the statements of the Minnesota Court, the fact is that there exist ample bases for a rational distinction between plastic and paper on energy grounds.

E. The Act Is Rationally Related To Solid Waste Disposal Goals.

There is also evidence that the plastic container consumes greater space in landfills than does any other container. While plaintiffs offered evidence concerning the potential recyclability and incineration characteristics of various containers, almost all consumer solid wastes in Minnesota are presently, and will be for the foreseeable future, disposed of in landfills and dumps.

The Weyerhauser Study, the results of which were adopted in the final MRI report, (T. 170, Ades Depo. 14, Plaintiffs' Exhibit I, at 5) concluded that the plastic container possessed a much greater spring-back tendency than did the paper container, and indicated that it occupies more than twice the landfill space of a paper carton. Data developed in Ontario supported this conclusion. *See* table, p. 21 *supra*. Furthermore, the spring-back of the paper container may be further reduced by becoming soggy, a tendency not shared by the plastic container. (T. 215)

Opinion evidence and analysis offered by the plaintiffs questioned whether the studies prove, conclusively, that the plastic container consumes substantially more landfill space. Even if this date does not prove beyond dispute that plastic

consumes more space, however, it certainly demonstrates that there is ample basis for the legislature to believe that this is the case. While witnesses for the plaintiffs were not completely confident of the landfill volume figures, they pointed to no hard evidence that the plastic containers do not have a greater tendency to create void space. Indeed, the final MRI Report, approved by both the MRI and E.P.A., adopted the Weyerhauser figures as the best available data and rejected the assumption that the plastic and paper containers would consume the same space.

Furthermore, Harold Samtur, an expert in solid waste disposal, based upon his review of the available sources and his substantial training and personal experience, testified that the plastic container would indeed consume more landfill space. (T. 557, 558, 607) The fact that these conclusions might be disputed by plaintiffs is not of constitutional significance. The very existence of reasoned debate requires that the matter be resolved in favor of the legislative judgment.

CONCLUSION

In its effort to address the environmental and resource problems of throwaway milk containers, the Minnesota legislature could have precipitously banned all but returnable and pouch containers, thus assuring more environmentally sound packaging immediately, but at the expense of massive economic and social disruption. Instead, however, the legislature chose to proceed more cautiously, and to eliminate first the plastic container. For the reasons set forth above, that choice is fully consistent with logic and legitimate legislative policy. Based upon decades of decisions of this Court, the Act must survive Fourteenth Amendment assault. The decision of the Minnesota Court, however, forsakes rationality analysis for a quasi-legislative inquiry as to which container is the worst and into whether that court believes the Act will ultimately achieve its goals. In making this inquiry, the lower court has substituted its judgment for that of the elected lawmakers on the question whether the statute ought have been passed, or whether some other measure would have been better.

If the Minnesota Court's analysis is permitted to stand, a legislature will not have the option to choose a step-by-step approach in addressing a problem, because the Constitution itself will be read to require substantially assured results, provable in court to the satisfaction of a judge. Neither will a legislature have the ability to address that aspect of a problem which, to the legislature, appears most acute, unless a court agrees, upon its own criteria, that the legislature has indeed addressed the "worst" aspect of the problem. Nor will the legislature be able to address a problem at a time of its choosing.

Efforts at stemming the tide of economic, environmental and energy problems, however, do not lend themselves to agreement concerning the best point of attack, or to guarantees of future success. Measures must be tried and their effects observed. That which is helpful should be retained and built upon. That which proves counter-productive should be repealed by the legislature. It is the trying, however, that is essential. As stated in *American Can Co. v. Oregon Liquor Control Comm.*, 15 Or.App. 618, 517 P.2d 691 (1973), itself a packaging regulation case:

> Selection of reasonable means to accomplish a state purpose is clearly a legislative, not a judicial, function, to which the admonitive language from Firemen v. Chicago R.I. & P.R. Co., supra, 393 U.S. at 136 and 138-139, 89 S.Ct. 323, quoted above is clearly applicable. In particular, the courts may not invalidate legislation upon the speculation that machines may be developed or because additional and complementary means of accomplishing the same goal may also exist. The legislature may look to its imagination rather than to traditional methods such as those which plaintiffs suggest, to develop suitable means of dealing with state problems, even though their methods may be unique. Each state is a laboratory for innovation and experimentation in a healthy federal system. What fails may be abandoned and what succeeds may be emulated by other states. The bottle bill is now unique; it may later be regarded as seminal.
>
> We conclude, therefore, that the bottle bill was properly enacted within the police power of the state of Oregon and that it is imaginatively, but reasonably, calculated to cope with problems of legitimate state concern.

517 P.2d at 700.

The State therefore prays that this Court reverse the determination of the Minnesota Court that the Act is unconstitutional and return the review of the wisdom and utility of the statute to the legislature, where it properly belongs.

Respectfully submitted,

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